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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CARL ANTHONY MITCHELL, Defendant and Appellant.	B202013 (Los Angeles County Super. Ct. No. BA310664)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marcelita Haynes, Judge. Affirmed.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Carl A. Mitchell appeals his conviction for selling cocaine base. (Health & Saf. Code, § 11352.) We find no error and affirm the conviction.

FACTUAL AND PROCEDURAL SUMMARY

The crime involved an undercover purchase of narcotics. On the evening of October 10, 2006, Officer Michael Saragueta of the Los Angeles Police Department was on duty, undercover, in a narcotics buy detail in Los Angeles. In that capacity, he worked as part of a team and was dressed in plainclothes instead of a uniform. He wore a two-way radio capable of transmitting conversations to other officers. He was working at Fifth Street and Crocker in downtown central Los Angeles (the "Fifth Street Corridor"), a high-crime area where buyers come to purchase drugs.

As he approached Fifth Street from Crocker he heard a man say, "Hey, Wood, come here." "Wood" is street vernacular for a white person; Saragueta is a white male with blond hair. He looked over and saw the speaker, appellant, looking at him. Appellant was on the opposite side of the street from Saragueta, who crossed over to appellant's side of the street. As he approached, appellant asked him what he wanted—the words were something to the effect of, "What are you looking for?" Saragueta responded, "a dime," a street term referring to $10 worth of rock cocaine. Appellant then turned to a woman who was sitting within a foot of him and told her to "Give him a dime." Her back was to the street, and Saragueta walked around her so that he was facing her. She gave Saragueta two off-white substances, and he gave her two $5 bills, the serial numbers of which had been prerecorded. Saragueta recognized the substance as rock cocaine. The substance was, in fact, cocaine base.

Saragueta signaled that the buy had been completed. Officers then came to the area and arrested appellant and the woman, Gail Harris. The two prerecorded $5 bills were found on her person.

The two-way radio transmissions of the conversations between Saragueta, appellant and Harris were heard by Officer Anthony Jackson and Detective Rickey Green, who testified to the transaction substantially as Saragueta had done. Officer

Roseann Dang was the "chase" officer who responded to the area to arrest appellant and Harris. She recovered the premarked bills.

Green testified that it is common in street buys for sellers to work in teams of two or three, with one acting as the "hook" to beckon a potential buyer and the other or others taking the money and furnishing the narcotics.

Harris pled guilty to charges growing out of the transaction and was serving time for that crime. She testified as a defense witness. She said that she knew appellant only in passing. She was sitting next to appellant on the evening of October 10, 2006, when she spotted Saragueta as a potential customer and asked appellant to get his attention—to call him for her—which he did. That was all appellant said or did; Harris conducted the rest of the conversation with Saragueta.

Prior act evidence was introduced by the prosecution. Los Angeles Police Department Officer Charles de Rosier testified that he was assigned as an undercover narcotics officer on the afternoon of January 16, 2004. He was in the vicinity of Fifth and Towne on a bicycle going southbound on Towne when appellant asked him, "What do you need?" De Rosier responded, "a dime," and appellant pointed to another man and said, "See the man in the gray shirt." De Rosier went up to the person indicated, who directed him to a third person, from whom he purchased the narcotics. The area also is part of the "Fifth Street Corridor" and is one block, or about 100 yards, from the location of the 2006 offense which led to the present conviction.

This evidence was received over defense objection, and was preceded by an admonition to the jury:

"Ladies and gentlemen of the jury, this evidence is being offered for a limited purpose only, and you may only consider this evidence for the limited purpose for which it's being offered. [¶] The People may present evidence that the defendant committed another offense not charged in this case. You may consider this evidence only if the People have proved it by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. [¶] Proof by a preponderance of the evidence is a different burden of proof than beyond a reasonable doubt. A fact is proved by a

preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely."

DISCUSSION

Appellant's argument on appeal is that evidence of the 2004 offense should not have been admitted, both because it was barred under Evidence Code section 1100 and because it was excludable under section 352 of that code. (All further code citations are to the Evidence Code.)

Subdivision (a) of section 1101 states the general rule that unless a specific exception applies (and none does in this case), "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Unless one of the specified exceptions applies, or evidence of specific conduct is admitted for some purpose other than character, such evidence is inadmissible. Subdivision (b) provides a nonexclusive list of permissible purposes for which uncharged act evidence is admissible, ranging from proof of identity of the perpetrator of the crime charged to intent, knowledge, mistake or accident.

The leading modern case on the topic is *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt)*. In that case, the Supreme Court reviewed the history, purpose, and scope of the rule. Similarity of factual context between the previous act and the circumstances of the present crime is a typical requirement of admissibility, but there is a range of similarity, depending on the purpose for which the evidence is offered. The greatest degree of similarity is required on the issue of identity. (*Id.* at p. 403.) That was not the purpose in this case.

In this case, the evidence was offered on the issues of intent and common design or plan. Evidence offered to prove a person's intent on a specific occasion requires the least amount of similarity. For that, the uncharged conduct "must be sufficiently similar

to support the inference that the defendant '"probably harbor[ed] the same intent in each instance."' [Citations.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402.) Common design or plan requires a somewhat greater degree of similarity. Quoting Wigmore, the court explained that the uncharged conduct must demonstrate not only similarity in results "'but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Ibid.*)

Evidence of the 2004 incident satisfies both requirements. As we have seen, both that and the 2006 offense involved a street sale of cocaine; in each appellant acted as the "hook," beckoning over a passerby and asking what he wanted, then directing him to another person (or persons) who furnished the substance. Each occurred in the same part of Los Angeles, the "Fifth Street Corridor" in the central city, an area frequented by persons who come to buy narcotics.

Appellant relies on *People v. Balcom* (1994) 7 Cal.4th 414, 423 (*Balcom*), a companion case to *Ewoldt*, for the proposition that where no reasonable juror could have concluded that the defendant lacked the requisite intent for the crime charged (in that case, forcible rape), the evidence should be excluded as more prejudicial than probative. We note, first, that this analysis goes to a related issue, section 352, and, second, that while finding the evidence should have been excluded on the issue of intent, the court determined it was properly admitted under the common design or plan, and affirmed the convictions. (*Id.* at pp. 422, 423, 428.)

A section 352 analysis is in order whenever uncharged conduct evidence is proffered. It was performed here. The court noted the similarity between the two crimes; the only material difference being that the earlier offense involved a hook and two persons, while the present crime involved a hook and one person. We find no abuse of discretion. In light of Harris's testimony, in which she took full responsibility for the cocaine sale, absolving appellant, appellant's intent was a contested issue. Its resolution was informed, in part, by the particularly close similarity between the charged crime and the previous offense. The court gave a limiting instruction before the evidence was

received, and substantially repeated it in the formal instructions given the jury before deliberation. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 [jurors generally understand and faithfully follow instructions].) Evidence of the previous offense was brief and not inflammatory, and appellant had been convicted of that crime, thus minimizing any tendency of the jury to convict in order to punish him for the earlier crime. (See *Ewoldt, supra*, 7 Cal.4th at p. 405, and *Balcom, supra*, 7 Cal.4th at p. 427.)

Finally, were there error in admitting this evidence (which there was not), it would be harmless in light of the overwhelming evidence of guilt. While it is true that appellant's first trial ended in mistrial when the jury was unable to reach a verdict, the evidence in this trial shows that appellant "hooked" Officer Saragueta over, asked him what he wanted, and on receiving his reply ("a dime"), directed Harris, who was seated next to him to "give him a dime." Besides Saragueta, two other officers heard the criminal discussion. Indeed, appellant's argument that uncharged offense evidence should not be admitted where evidence of the mental state at issue (intent) is strong, demonstrates that admitting such evidence is less likely to be prejudicial than where evidence of the mental state is weak.

DISPOSITION

The judgment of conviction is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J. SUZUKAWA, J.